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UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

ORIGINAL

August 2, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Comments in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185

Dear Ms. Salas:

Enclosed please find an original and twelve copies of the *ex parte* Comments from the National Telecommunications and Information Administration the above-captioned proceedings. A copy of these Comments were hand-delivered to Chairman Kennard, each of the Commissioners, Kathryn C. Brown, Chief of Staff, and Lawrence E. Strickling, Chief of the Common Carrier Bureau.

Please direct any questions you may have regarding this filing to the undersigned. Thank you for your cooperation.

Respectfully submitted,

Milton Brown for Kathy Smith

Kathy D. Smith
Acting Chief Counsel

Enclosures

cc: The Honorable William E. Kennard
The Honorable Susan Ness
The Honorable Harold Furchtgott-Roth
The Honorable Michael Powell
The Honorable Gloria Tristani
Kathryn C. Brown, Chief of Staff
Lawrence E. Strickling, Chief, Common Carrier Bureau
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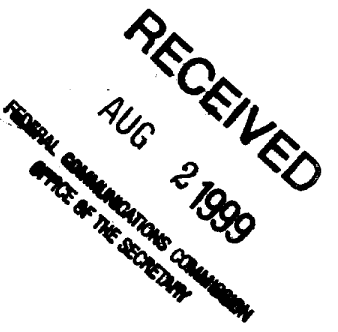
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

EX PARTE COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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August 2, 1999

EXECUTIVE SUMMARY

The market-opening provisions of the Telecommunications Act of 1996 (1996 Act) are stimulating the growth of local exchange competition. More than 140 companies are now providing local service in the 100 largest urban markets, as well as many smaller areas. Competitive local exchange carriers (CLECs) have attracted more than $30 billion in capital and currently serve between 2 and 3 percent of all local access lines. Although competitors provide service predominantly via facilities acquired from incumbent local exchange carriers (ILECs), CLECs are also aggressively deploying their own switching and transmission equipment. One investment firm has identified the reasons for this proliferation of competition -- "the combination of access to low cost capital coupled with a clear regulatory and public policy initiative toward opening up local markets." The fundamental question at issue in this proceeding is whether the Commission should alter the course it set in 1996 and change substantially the ILECs' unbundling obligations under section 251(c)(3) of the Communications Act. NTIA believes that it should not.

The Administration has consistently favored competition as the most effective mechanism for promoting investment in our nation's information infrastructure. Competition will also benefit consumers by reducing prices, increasing the range of available services, and speeding deployment of advanced telecom networks and services. We see these forces at work today in communities throughout the country.

The 1996 Act reflects that same procompetitive philosophy. Of particular relevance for this proceeding, the Act seeks to foster local exchange competition by creating entry

opportunities for new service providers. It does so by, among other things, imposing extensive unbundling obligations on ILECs. For the most part, the unbundling rules adopted by the Commission in its August 1996 *Local Competition Order* properly implement the framework that Congress established and further the Act's procompetitive ends. Although the Supreme Court's decision in *AT&T v. Iowa Utilities Board* mandates changes in those rules, NTIA does not believe it requires a fundamental change in the course that the Commission has already charted.

NTIA therefore recommends that the Commission reinstate in most respects its 1996 unbundling regime. Specifically, the Commission should reaffirm its list of seven network elements that ILECs must provide to competitors, upon request, on a nationwide basis: (1) local loops; (2) network interface devices; (3) local switching; (4) interoffice transmission facilities; (5) signalling networks and call-related databases; (6) operations support systems; and (7) operator services and directory services. The text and legislative history of the 1996 Act indicate that Congress concluded that ILEC provisioning of those elements was necessary, at a minimum, to open up the ILECs' local exchange networks to competitive entry. NTIA also supports the Commission's tentative decision to continue allowing State commissions to require ILECs to furnish other network elements to competitors on an unbundled basis if the State commissions conclude that such requirements would be consistent with the provisions of the 1996 Act, as construed by the Commission in this proceeding.

Although the 1996 Act imposes extensive unbundling obligations on ILECs, NTIA nevertheless agrees that those requirements must be limited in scope and in duration. Such limits will not substantially reduce entry opportunities for new providers and should increase the likelihood of facilities-based competition, which in the long run will provide consumer benefits, increase firms' incentives to innovate, and create opportunities for deregulation. Thus, we favor a construction of the "necessary" and "impair" standards in section 251(d)(2) that would not entitle a competitor to obtain from an ILEC any network element merely on a showing that the element would be useful to the competitor in providing service. Instead, the competitor would have to show, or the relevant government agency would have to conclude, that a failure to obtain the requested element would appreciably and adversely affect the competitor's ability to offer service, taking into account the element's availability elsewhere in the market. Under this standard, the Commission could reasonably determine, for example, that ILECs need not provide access to readily available digital subscriber line access multiplexers (DSLAMs) on an unbundled basis if competitors have reasonable and timely access to ILEC subscriber loops and collocation space.

Finally, NTIA concludes that in market areas and market segments where the growth of competition has rendered enforcement of unbundling requirements unnecessary and, potentially, counterproductive, the Commission has the authority to forbear from applying the Act's unbundling provisions. We suggest that, in the first instance, the Commission exercise that forbearance authority by continuing the ILECs' unbundling obligations, but affording ILECs greater flexibility in pricing particular UNEs in markets where competitive alternatives

are readily available. NTIA recommends that the Commission specify standards to be used in determining whether forbearance would be appropriate in particular instances and discusses several factors that could be considered.

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EX PARTE COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

The National Telecommunications and Information Administration (NTIA), an Executive Branch agency within the Department of Commerce, is the President's principal advisor on domestic and international telecommunications and information policy. NTIA respectfully comments on the Commission's Second Further Notice of Proposed Rulemaking (*Notice*) in the above-captioned proceeding.[1/]

1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 96-182 (rel. Apr. 16, 1999) (hereinafter *Notice*). Unless otherwise indicated, all subsequent citations to "Comments" shall refer to pleadings filed on May 26, 1999 in CC Docket No. 96-98.

I. INTRODUCTION AND SUMMARY OF POSITION

In February 1996, Congress enacted and the President signed into law landmark telecommunications reform legislation.[2/] The fundamental objective of the Telecommunications Act of 1996 is "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[3/] Although Congress expressed its market-opening aims in general terms, it recognized that "[c]entral to opening up telecommunications to competition" was the establishment and expansion of competition in one particular area -- the local exchange markets controlled by incumbent local exchange carriers (ILECs).[4/] Accordingly, while Congress imposed general duties and obligations for all telecommunications carriers, it subjected ILECs, and only ILECs, to additional and extensive interconnection, unbundling, and resale requirements.[5/]

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* (1996 Act). For convenience and unless otherwise indicated, all subsequent citations to the 1996 Act will refer to the corresponding sections in the United States Code.

3/ H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 (hereinafter CONFERENCE REPORT).

4/ 141 Cong. Rec. H8464 (daily ed. Aug. 4, 1995) (statement of Rep. Fields). *See also* H.R. Rep. No. 104-204, at 81 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 47 (hereinafter HOUSE REPORT) ("primary objective . . . of this legislation is to foster competition for local exchange and exchange access services").

5/ *See* 47 U.S.C. § 251(a), (b), (c) (Supp. II 1996). *See also AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 738 (1999) (1996 Act "can be read to grant . . . 'most promiscuous rights' . . . to competing carriers *vis-a-vis* [ILECs]").

In August 1996, the Commission promulgated regulations implementing those portions of the 1996 Act designed to foster local exchange competition -- including sections 251 and 252.[6/] Of particular relevance here, the Commission adopted a core set of national standards and procedures to promote consistent action by the private parties and State agencies charged with converting the Act's requirements into particular agreements between ILECs and CLECs.[7/] In so doing, the Commission generally construed the ILECs' interconnection, unbundling, and resale obligations under section 251(c) broadly -- *i.e.*, to give competitive local exchange carriers (CLECs) more access to the ILECs' local networks, rather than less -- consistent with its understanding of the pro-competitive objectives of the 1996 Act.

Last January, the Supreme Court rejected most of the challenges to the Commission's regulations.[8/] Most importantly, the Court concluded that the Commission had broad authority to issue national regulations implementing sections 251 and 252 of the 1996 Act.[9/] At the same time, however, the Court overturned section 51.319 of the Commission's rules

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6/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, *recon.*, 11 FCC Rcd 13042, *second recon.*, 11 FCC Rcd 19738, *third recon.*, 12 FCC Rcd 12460, *aff'd in part and rev'd in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) (hereinafter *Local Competition Order*).

7/ Section 252 of the 1996 Act contemplates that the obligations set forth in section 251 and the Commission's implementing regulations will be given concrete expression through agreements negotiated by the affected carriers, subject in many instances to arbitration by the appropriate State regulatory commission. *See* 47 U.S.C. § 252(a)-(b) (Supp. II 1996).

8/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

9/ *Id.* at 729-733.

(Rule 319),[10] which specifies the network elements that ILECs must make available on an unbundled basis to CLECs pursuant to section 251(c)(3) of the Act.[11] The Court determined that the Commission's selection of the unbundled network elements (UNEs) enumerated in Rule 319 rested on an unreasonable construction of the "necessary" and "impair" standards set out in section 251(d)(2) of the Act.[12] Specifically, the Court held that, in applying those standards, the Commission erred (1) by not considering the "availability of elements outside the [ILEC's] network" and (2) by assuming "that *any* increase in cost (or decrease in quality) imposed by [an ILEC's] denial of a particular network element . . . causes the failure to provide that element to 'impair' the [CLEC's] ability to furnish its desired services." [13] The Court therefore remanded the unbundling issue to the Commission for further proceedings consistent with the Court's opinion.

ILECs take the minor cracks in the Commission's unbundling regime opened by the Court's opinion as an opportunity to raze the building.[14] They insist that the Commission

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10/ 47 C.F.R. § 51.319 (1998).

11/ *AT&T Corp.*, 119 S.Ct. at 734-736.

12/ *Id.* at 734. Although the Court's decision only vacates section 51.319, its criticism of the Commission's application of section 251(d)(2) necessarily calls into question the validity of section 51.317, 47 C.F.R. § 51.317 (1998), which establishes the standards by which State commissions, on a going forward basis, may designate UNEs beyond those specified in section 51.319. *See Notice* ¶ 14 n.21.

13/ *AT&T Corp.*, 119 S.Ct. at 735 (emphasis in original).

14/ USTA claims, for example, that "the Commission cannot impose mandatory unbundling obligations on ILECs consistent with the Court's opinion" unless and until "the Commission conducts a comprehensive, nationwide review of competition on a market-by-

(continued...)

must construe the open-ended unbundling language of the Act in accordance with their own notions of antitrust law and principles of economic efficiency.[15/] The virtue of that approach for the ILECs is that, if their particular version of antitrust and efficiency were adopted, it would dramatically reduce their unbundling obligations under the 1996 Act and, not incidentally, perpetuate their dominant positions in local exchange markets.

The Commission's task in the present rulemaking, however, is to fashion an unbundling regime that incorporates the Court's limited holdings but, more importantly, effectuates the framework that Congress established and furthers the fundamental objective of the 1996 Act -- to foster competition in all telecommunications markets by creating entry opportunities for new service providers.[16/] NTIA believes, moreover, that it is important for

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14/ (...continued from preceding page)
market basis." Comments of the United States Telephone Association at 10 (USTA Comments).

15/ *See, e.g.*, Ameritech Comments at 17-27; Comments of GTE Service Corp. at 12-20 (GTE Comments); USTA Comments at 18-28.

16/ Section 251(c)(3) requires ILECs to provide UNEs "to *any* requesting telecommunications carrier." 47 U.S.C. § 251(c)(3) (Supp. II 1996) (emphasis added). The legislative history, moreover, is replete with statements indicating that Congress sought to expand competition by maximizing entry opportunities by individual competitors. *See, e.g.*, S. Rep. No. 104-23, at 5 (1995) (hereinafter SENATE REPORT) (Senate bill requires ILECs "to open and unbundle network features and functions to allow any customer or carrier to interconnect with the carrier's facilities"); HOUSE REPORT at 48, 1996 U.S.C.C.A.N. at 11 (House bill "promotes competition in the market for local telephone service by requiring local telephone companies . . . to offer competitors access to parts of their networks"); 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996) (statement of Sen. Burns) ("rules on interconnection will empower competitors by ensuring that they can gain access on fair and reasonable terms to existing local telephone facilities"); 141 Cong. Rec. H8464 (daily ed. Aug. 4, 1995) (statement of Rep. Fields) ("what we have attempted to do is to open [the local network] in a sensible and fair way to all competitors"); 141 Cong. Rec. H8282 (daily ed. Aug. 2, 1995)
(continued...)

the Commission's unbundling rules to promote efficient facilities-based competition. To be sure, the 1996 Act affords competitors three distinct entry options -- construction of their own facilities, resale of ILEC services, and purchase of ILEC UNEs -- and does not express a preference for a particular mode of entry.[17/] Facilities-based entry, however, produces benefits that the other two entry strategies do not or produce only to a lesser degree. As the Commission has pointed out, construction of new local exchange networks "will not only lead to innovation by the new competitors, but should also spur [ILECs] to upgrade their systems and offer a broader array of desired service options to meet consumers' demands."[18/]

Furthermore, although entry via UNEs or resale can increase local competition, both paths require substantial regulatory oversight to ensure that the rates ILECs charge for such arrangements are reasonable.[19/] "Pure" facilities-based entry also increases competition, but

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16/ (...continued from preceding page)
(statement of Rep. Bliley) (House bill requires ILECs "to open the local exchange network to competitors seeking to offer local telephone services"). The obvious conclusion is that Congress sought to foster entry by multiple firms and then let competitive market processes distinguish the "efficient" providers from the "inefficient" ones.

17/ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Service in Michigan, *Memorandum Opinion and Order*, 12 FCC Rcd 20543, 20745-20746, ¶¶ 386-387 (1997).

18/ Promotion of Competitive Networks in Local Telecommunications Markets, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, WT Docket No. 99-217, CC Docket No. 96-98, FCC 99-141, ¶ 23 (rel July 7, 1999) (hereinafter *Local Competition Rulemaking*).

19/ NTIA has expressed concern that the Commission's chosen methodology for fixing the price of interconnection and UNEs, and for determining the discount applicable to resold ILEC service -- Total Element Long Run Incremental Cost (TELRIC) -- if rigidly applied, may produce prices that do not accurately reflect the costs of providing the service or
(continued...)

does not entail the same government scrutiny of the ILECs' practices, because the new entrant is less dependent on ILEC facilities and services. Furthermore, substantial facilities-based competition can exert a disciplining effect on ILEC rates for resale and UNEs that could reduce, over time, the need for regulators to monitor ILEC rates for the latter offerings. In this way, unbundling rules that foster *efficient* facilities-based local entry (*i.e.*, entry based on an accurate assessment of the relative costs of different entry strategies) would serve the proconsumer, procompetitive, and deregulatory objectives of the 1996 Act.

19/ (...continued from preceding page)
arrangement in question. *See* Reply Comments of the National Telecommunications and Information Administration in CC Docket No. 96-98 at 18-25 (filed May 30, 1996) (NTIA Reply Comments). If TELRIC-based pricing were to produce unreasonably low UNE rates, the aggressive unbundling framework that Congress enacted could induce artificially CLECs to enter the local market via UNEs, as opposed to, for example, facilities-based entry. It could also reduce incentives for ILECs and others to invest in advanced telecommunications facilities and networks.

The experience gained from State arbitrations conducted over the past three years suggests that, in practice, the TELRIC standard may be flexible enough to avoid these problems. *See, e.g., US West Communication, Inc. v. Jennings*, CV97-26-PHX-RGS-OMP, 1999 U.S. Dist. LEXIS 6821, at *7-*8 (D. Ariz. May 4, 1999) ("Because TELRIC focuses on a mythical network instead of [the ILEC's] existing network, each party was free to offer its own vision of this mythical network, limited only by the party's audacity and its ability to procure an expert witness willing to endorse that party's vision."). The Commission should continue to monitor the situation. *See Local Competition Rulemaking* ¶ 16. NTIA also recommends that the Commission give States sufficient flexibility in applying the national TELRIC methodology so that CLECs will continue to make efficient choices among the entry alternatives that the 1996 Act affords them. *See, e.g., Southwestern Bell Telephone Company v. AT&T Communications off the Southwest, Inc.*, No. A 97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637, at *38 (W. D. Tex. Aug. 31, 1998) (approving Texas Public Utility Commission's decision to adopt its variation of TELRIC "which takes into account [ILEC's] existing network routes, wire center locations, and 'Texas-specific data' such as 'the costs associated with construction and rights-of-way that [ILEC] actually incurs in the laying of its network.'").

NTIA believes that the Commission can adhere to the Supreme Court's mandate, faithfully implement the unbundling framework that Congress created, and encourage efficient facilities-based entry without making substantial changes to its existing unbundling rules. Accordingly, NTIA respectfully recommends the following actions:

1. Scope of the ILEC's Unbundling Obligations

- The Commission should hold that the "necessary" criterion in section 251(d)(2) applies only to "proprietary" network elements, and that the "impair" standards applies to both proprietary and "nonproprietary" elements.
    - The Commission should consider a proprietary element to be "necessary" if that element (and the capabilities it provides) is a prerequisite to the provision of a telecommunications service. In other words, is the desired service possible without the capabilities and functionalities that the requested element affords?
    - To ensure that unbundling requirements do not unduly reduce an ILEC's incentives to innovate, a CLEC's inability to obtain a proprietary network element from an ILEC should be deemed to "impair" that CLEC if the carrier's self-provisioning of that element, or its securement from another source, imposes a "significant" penalty on the CLEC in terms of cost, service quality, time to market, etc. With respect to nonproprietary elements, on the other hand, an impairment should exist if the requesting CLEC suffers a nontrivial increase in cost or delay in providing service as a result of its inability to secure a desired UNE from the ILEC.
- The Commission should apply the statutory standards and specify a list of UNEs, to be applicable uniformly throughout the country.[20/] NTIA believes that a reasonable set of national UNEs should include, at a minimum, the seven elements set forth in Rule 319: (1) local loops; (2) network interface devices; (3) local switching; (4) interoffice

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20/ The Commission has previously held that the unbundling and other market-opening provisions of the 1996 Act are not applicable only to voice or circuit-switched services. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd at 24032-24034, ¶¶ 40-44 (1998) (hereinafter *First Section 706 Order*). It should specifically reaffirm that determination here.

transmission facilities; (5) signalling networks and call-related databases; (6) operations support systems; and (7) operator services and directory services.

- The Commission should allow State commissions to require that ILECs make available UNEs not specified in the Federal list if CLECs requesting those UNEs can demonstrate that their provision satisfies the relevant statutory standards.

    - If, however, (1) an ILEC agrees to provide a requested UNE, or (2) a State commission orders an ILEC to provide a particular UNE, the Commission should create a rebuttable presumption that ILECs in any other part of the country must provide that same UNE to requesting carriers. The burden would then be on the ILEC to show that provision of that UNE to a requesting CLEC would be inconsistent with the terms of the Act and the Commission's implementing regulations.

2. Relaxation of Unbundling Obligations: Although Congress imposed broad-ranging unbundling obligations on ILECs, it did not require that those requirements be perpetual or immutable. As those obligations (and the other market-opening provisions of the 1996 Act) succeed in stimulating more and more competition, the point may come when the costs of those requirements outweigh the incremental benefits. The Commission may not, however, "sunset" the provisions of section 251 upon the mere passage of time because it lacks the authority to do so. It may, on the other hand, forbear from applying them in accordance with the provisions of section 10 of the 1996 Act.[21/] As discussed below, NTIA recommends

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21/ [T]he Commission shall forbear from applying any regulation or provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carrier or telecommunications service, in any or some of its of their geographic markets, if the Commission determines that --

(1) enforcement of such regulation or provision is not necessary to ensure that the charges' practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(continued...)

that, in the first instance, the Commission consider relaxing the unbundling requirements not by eliminating the obligation to furnish particular UNEs whose provision would otherwise satisfy the statutory requirements, but by giving ILECs greater flexibility in pricing those UNEs. We also describe below some of the factors that the Commission should address in deciding whether forbearance would be appropriate in particular instances.

The market-opening provisions of the 1996 Act are stimulating the growth of local exchange competition. More than 140 companies are now providing local service in the 100 largest urban markets, as well as many smaller areas.[22/] CLECs have attracted more than $30 billion in capital and currently serve between 2 and 3 percent of all local access lines.[23/] Although competitors provide service predominantly via facilities acquired from the ILECs, CLECs are also aggressively deploying their own switching and transmission equipment.[24/] ILECs and CLECs have widely divergent views as to effects of these developments on the market dominance historically enjoyed by the ILECs. That debate, however, is of less import to the present proceeding than are the reasons for the progress made to date -- "the

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21/ (...continued from preceding page)

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
(3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a) (Supp. II 1996).

22/ *See, e.g.*, COUNCIL OF ECONOMIC ADVISERS, PROGRESS REPORT: GROWTH AND COMPETITION IN U.S. TELECOMMUNICATIONS 1993-1998 8, 18 (Feb. 8, 1999).

23/ *Id.* at 16, 18, 24.

24/ *Id.* at 17-18.

combination of access to low cost capital coupled with a clear regulatory and public policy initiative toward opening up local markets."[25/] The fundamental question at issue here is whether the Commission should alter the course established in 1996 and change substantially the ILECs' unbundling obligations under section 251(c)(3). NTIA believes that it should not. Such changes are not required by the Supreme Court's decision and would not further the goals and objectives of the 1996 Act.

II. IN ENACTING SECTION 251(C)(3), CONGRESS INTENDED TO GIVE CLECS BROAD ACCESS TO UNBUNDLED NETWORK ELEMENTS.

The Commission's task in this proceeding is to revise its rules implementing the unbundling provisions of the 1996 Act, taking into account the Supreme Court's limited comments as to the meaning of those provisions. To do so, the Commission must not only hew to the Court's holding but also gain a clear understanding of the unbundling rights and responsibilities that Congress meant to create when it enacted sections 251(c)(3) and (d)(2).[26/]

25/ Salomon Smith Barney, *CLECs Surpass Bells in Net Business Line Additions for First Time* (May 6, 1998).

26/ The best evidence of congressional intent is the statutory text, viewed as a whole. *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (central tenet of statutory construction is "that a statute is to be considered in all its parts when construing any one of them"); *Freytag v. Commissioner*, 501 U.S. 868, 873 (1991) (when a court "find[s] the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances"). When the language is ambiguous, as is the case here, it is necessary to consider the associated legislative history. *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 627 (1993); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). Furthermore, when the statute is ambiguous, a court may not substitute its construction of the text for a reasonable interpretation made by the agency

(continued...)

One important question is the possible relationship between the statutory unbundling requirements and the so-called "essential facilities" doctrine. Although the Court specifically declined to decide whether section 251(d)(2) codifies "something akin" to that antitrust concept,[27/] Justice Breyer, concurring in the Court's judgment, opined that the statute "does impose related limits upon the FCC's power to compel unbundling."[28/] The Commission has therefore solicited comment "on the significance of the essential facilities standard under section 251(d)(2)."[29/]

NTIA submits that, if anything is clear from the text of the Act's unbundling requirements, it is that they do not codify the essential facilities doctrine.[30/] The language of the statute makes no mention of it and congressional reports and debates concerning the bills that became the 1996 Act are devoid of any reference to it. More importantly, the

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26/ (...continued from preceding page)
charged with administering the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

27/ *Id.* at 734.

28/ *Id.* at 753.

29/ *Notice* ¶ 21.

30/ Ameritech suggests that although the Supreme Court "may not have labeled its analysis an essential facilities," its opinion commands the Commission to employ such an analysis in defining UNEs. Ameritech Comments at 30. But the Court cannot read such a standard into the 1996 Act if Congress did not so require it. *See Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (courts "do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it."); *United States ex rel. Harlan v. Bacon*, 21 F.3d 209, 211 (8th Cir. 1994) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941)) ("it is not [court's] function to engraft on a statute additions we think the legislature logically might or should have made").

requirements for making an essential facilities case differ in material respects from the unbundling standards set forth in section 251(c)(3) and (d)(2) of the 1996 Act.

The "essential facilities" doctrine holds that "a firm which controls a facility essential to its competitors may be guilty of monopolization [under section 2 of the Sherman Act] if it refuses to allow them access to the facility.[31/] To invoke the doctrine, four elements must be proven:

> (1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the competitor to provide the facility.[32/]

Courts have occasionally ruled that a facility will be deemed essential "only if control of the facility carries with it the power to *eliminate* competition in the downstream market."[33/] Most courts have held that, at a minimum, a plaintiff must show that the defendant's refusal to grant access to its facility has inflicted a "severe handicap on potential

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31/ *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986). Thus, the essential facilities analysis does not so much establish a separate antitrust offense as it provides evidence of unlawful monopolization or monopoly leveraging.

32/ *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 544 (4th Cir. 1991) (citing *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132-1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)).

33/ *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 n.5 (9th Cir. 1992) (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991)) (emphasis in original).

market entrants."[34/] Furthermore, that refusal must be unreasonable, with reasonableness being determined from the perspective of the defendant monopolist.[35/] Finally, the case law indicates that denial of access to an essential facility may not be actionable if the monopolist has legitimate business reasons for its actions.[36/]

The 1996 Act plainly imposes on ILECs a broader duty to deal with CLECs than does the essential facilities doctrine. Even adopting the construction of section 251(d)(2) that is most favorable to the ILECs -- *i.e.*, that the "impairment" standard applies to all CLEC requests for UNEs -- the common definition of "impair" does not even approximate the "severe handicap" that a CLEC must suffer in order to make an essential facilities claim.[37/] Further, the prices for UNEs must accord with a cost standard established by Congress, further defined by the Commission, and applied by State commissions.[38/] And, if

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34/ *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). *Accord Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990).

35/ *See, e.g., Laurel Sand & Gravel, Inc.*, 924 F.2d at 544-545. In particular, the monopolist has no obligation to grant access at a price that guarantees the plaintiff a profit on the final product. *Id.* at 545.

36/ *See, e.g., Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 190 (2d Cir. 1992) (protecting image of corporation's products); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d at 1381 (ensuring lower prices for monopolist's customers); *MCI Telecommunications Corp.*, 708 F.2d at 1133 (plaintiff's financial unsoundness); *City of College Station v. City of Bryan*, 932 F. Supp 877, 888 (S.D. Tex. 1996) (discouragement of "free riding").

37/ *See infra* Section III.C.2.

38/ *See* 47 U.S.C. § 252(d) (Supp. II 1996). The Supreme Court expressly upheld the Commission's authority to promulgate regulations to implement section 252(d). *AT&T Corp.*, 119 S.Ct. at 729-733.

application of section 251(d)(2) confirms that a CLEC is entitled to a particular UNE, the statute gives the ILEC only one excuse for not furnishing it -- *i.e.*, only if provision of that UNE at the point requested by the CLEC is not technically feasible.[39/]

Section 251 gives CLECs broader access to ILEC networks than would be available under an essential facilities analysis because that section was intended to serve a much broader purpose. The central purpose of the antitrust doctrine is to prevent the expansion of monopoly power from one market to another.[40/] As AT&T points out, if the underlying monopoly was lawfully obtained, the antitrust laws generally will not disturb it, but will only seek to prevent its misuse.[41/] Section 251, on the other hand, is designed to strike at the heart of the monopoly itself. Congress was faced with a government-sanctioned local exchange monopoly and determined that that monopoly must be opened to competition.[42/]

39/ *See* 47 U.S.C. § 251(c)(3) (Supp. II 1996).

40/ *See, e.g., MCI Telecommunications Corp.*, 708 F.2d at 1132 (refusal to grant access to an essential facility "may be unlawful because a monopolist's control of an essential facility . . . can extend monopoly power from one stage of production to another, and from one market to another").

41/ *See* AT&T Comments at 49-50 and authorities cited therein. Although the AT&T Consent Decree severely restricted the BOCs' ability to enter other markets, it left intact the local exchange monopolies whose continued existence necessitated those line of business restrictions. *See United States v. AT&T*, 552 F. Supp. 131, 186-191 (D.D.C. 1982).

42/ *See, e.g.*, HOUSE REPORT at 47-48, 1996 U.S.C.C.A.N. at 11 ("For decades, U.S. telecommunications policy has relied heavily on regulated monopolies to provide telecommunications services to business and consumers. . . . Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies."); 141 Cong. Rec. S8015 (daily ed. June 8, 1995) (statement of Sen. Pressler) ("if we had done what we are trying to do in this bill -- that is, to require [ILECs] to unbundle and interconnect, to allow

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Because Congress sought to *eliminate* the monopoly, rather than simply to prevent its expansion, the tools that it employed were necessarily more extensive than would be appropriate for a court to use in remedying a violation of the essential facilities doctrine.

Indeed, to the extent that Congress considered the essential facilities doctrine at all, it concluded that (1) the ILECs' networks *are* essential facilities and (2) that alternative providers must have broad access to those facilities if there was to be local competition:

> In the overwhelming majority of markets today, because of their government-sanctioned-monopoly status, [ILECs] maintain bottleneck control over the essential facilities needed for the provision of local telephone service. The bottleneck consists of the elements needed to originate or terminate a telephone call -- the equipment with capabilities of routing and signalling calls, network capacity and network standards. The inability of other service providers to gain access to the [ILECs'] equipment inhibits competition that could otherwise develop in the local exchange market.[43/]

42/ (...continued from preceding page)
for local competition, . . . the whole telephone communications industry might be more innovative today than it is").

43/ HOUSE REPORT at 49, 1996 U.S.C.C.A.N. at 13. *See also* "TELECOMMUNICATIONS COMPETITION AND DEREGULATION ACT OF 1995: A PRO-COMPETITIVE, DE-REGULATORY POLICY PRESCRIPTION," Executive Summary at 2 (Jan. 31, 1995) (Pressler Policy Paper) ("Local telephone service is predominantly a monopoly service. Although business customers in metropolitan areas may have alternative providers for exchange access service, consumers do not have a choice of local telephone service. Some states have begun to open local telephone markets to competition. We need a national policy framework to accelerate the process"); *id.* at 6 ("Interconnection to the local exchange bottleneck network is a fundamental requirement for a competitive market in local exchange and exchange access service."); 141 Cong. Rec. S8197 (daily ed. June 12, 1995) (statement of Sen. Pressler) ("Interconnection and unbundling will put new competitors . . . on the same footing with former monopolies."); 141 Cong. Rec. S7906 (daily ed. June 7, 1995) (statement of Sen. Lott) ("It is critical to recognize the reason why all of these barriers, restrictions, and regulations exist in the first place -- the so-called bottleneck. Opening the local network removes the bottleneck and ensures that all
(continued...)

There is no indication, moreover, that Congress meant for network elements to be unbundled only when such unbundling comports with an ILEC's view of economic reasonableness.[44/] The Senate expected that questions about the reasonableness of a

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43/ (...continued from preceding page)
competitors will have equal and universal access to all consumers").

ILECs cite the passage quoted in the text as evidence that Congress "had the essential facilities doctrine in mind when it adopted the unbundling requirement." Ameritech Comments at 31. *See also* GTE Comments at 15. The text does not even suggest, however, that the House Committee was using the phrase "essential facilities" in its technical sense. Further, the ILECs do not account for the fact that the second sentence of the quoted passage (which the ILECs do not cite) seems to contemplate the unbundling of elements (*e.g.*, switching and signalling) that the ILECs now claim, based upon an essential facilities analysis, do not need to be unbundled in many instances. Finally, Congress' finding in 1995 that the ILECs' networks are essential facilities to which competitors must have access cannot be squared with the ILECs' contention that the decision to unbundle a particular UNE must turn on some future determination of "essentiality."

44/ Mr. Justice Breyer speculated that the 1996 Act's generalized specification of the ILECs' unbundling obligations "reflect[s] congressional uncertainty about the extent to which compelled use of an [ILEC's] facilities will prove necessary to avoid waste." *AT&T Corp.*, 119 S.Ct. at 753. More likely, Congress opted for general language to give the Commission some latitude to identify new UNEs as the ILECs' networks and competitors' needs change. *See, e.g.*, 141 Cong. Rec. S8468 (daily ed. June 15, 1995) (statement of Sen. Pressler) ("[C]ompetitive checklist [in section 271(c)(2)(B)] could best be described as a snapshot of what is required for these competitive [local exchange] services now and in the reasonably foreseeable future . . . [s]ection 251's 'minimum standards' permit regulatory flexibility and are not limited to a 'snapshot' of today's technology or requirements").

Justice Breyer correctly identified the costs of unlimited unbundling:

> Rules that force firms to share *every* resource or element of a business would create, not competition, but pervasive regulation. . . . A totally unbundled world -- a world in which competitors share every part of an incumbent's existing system, including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges) -- is a world in which competitors would have little, if anything, to compete about.

AT&T Corp., 119 S.Ct. at 754. But the 1996 Act does not create such a world. It mandates unbundling only of network elements -- defined as facilities and equipment and their

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competitor's unbundling request would be resolved not during the Commission's specification of the ILECs' unbundling requirements under section 251(d)(2), but during the interconnection negotiations between ILECs and competitors.[45/] The House of Representatives was even more explicit on this point:

> [ILECs] have the duty to offer unbundled services, elements, features, functions, and capabilities whenever technically feasible. During the Committee's consideration of the bill, the Committee deleted a requirement that unbundling be done on an "economically reasonable" basis out of concern that this requirement could result in certain unbundled services, elements, features, functions, and capabilities not being made available. The Committee clarified, however, . . . that the beneficiary of unbundling must pay its cost.[46/]

44/ (...continued from preceding page)
associated functions and capabilities. *See* 47 U.S.C. § 153(29) (Supp. II 1996). In the main, therefore, the Act requires only "the sharing of readily separable and administrable physical facilities." *AT&T Corp.*, 119 S.Ct. at 753. While the Act arguably does compel the sharing of personnel in some instances (*e.g.*, operators, technicians involved in provisioning, repairing, and maintaining UNEs), that sharing occurs only when an ILEC is obliged to furnish some facility or equipment as a UNE. The Act does not authorize widescale sharing of ILEC personnel, advertising, research facilities, or firm management.

Finally, Justice Breyer was right to note that unbundling "does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *Id.* at 754. It is nevertheless true that even a fairly broad unbundling requirement can give competitors room to innovate, for example, in the services that they can create using those elements, or in the way that they price, package, and market the services they create. *See, e.g.*, Comments of Qwest Communications Corp. at 12.

45/ SENATE REPORT at 20 ("The negotiation process . . . is intended to resolve questions of economic reasonableness with respect to interconnection requirements.").

46/ HOUSE REPORT at 71, 1996 U.S.C.C.A.N. at 37. *See also* 47 U.S.C. § 251(d) (Supp. II 1996). Congress' reliance on pricing rules to help ensure the reasonableness of competitors' unbundling requests underscore the need for the Commission to make sure that its rules are "right." *See supra* note 19.

Congress was aware that the section 251(c) unbundling, interconnection, and resale requirements would exact substantial costs and burdens on the carriers subject to them.[47/] It nevertheless decided that, on balance, the competitive benefits that such obligations might produce were worth the costs that they would entail. To be sure, Congress did conclude that, in some circumstances, the costs could outweigh the benefits. Again, however, its chosen response was not to weaken the requirements themselves, but (1) to limit the range of carriers subject to them[48/] and (2) to require that competitors pay the costs of the elements they request.

III. SECTION 251(D)(2) DOES NOT REDUCE SUBSTANTIALLY THE UNBUNDLING REQUIREMENTS MANDATED BY SECTION 251(C)(3).

The legislative history of the 1996 Act confirms that, in enacting section 251(c)(3), Congress intended to confer substantial unbundling rights upon CLECs. That conclusion is supported by the statutory text, which imposes only four limits on a CLEC's demand for parts of an ILEC's network:

47/ *See, e.g.*, HOUSE REPORT at 74, 1996 U.S.C.C.A.N. at 39 ("saddling the full weight of all of these [interconnection, unbundling, and resale] requirements immediately on new entrants will discourage persons from entering the market"); *id.* at 208, 1996 U.S.C.C.A.N. at 101 (additional views of Reps. Dingell, Tauzin, Boucher, and Stupak) (stating that House bill "imposes new and burdensome regulatory requirements" on the BOCs).

48/ Although the section 251(c) obligations apply to all ILECs, rural telephone companies are exempted from them under certain conditions and small carriers may petition State commissions for suspension or modification of those requirements under certain conditions. 47 U.S.C. § 251(c), (f) (Supp. II 1996).

(1) The CLEC must request a "network element";

(2) The element must be used to provide a "telecommunications service";

(3) Unbundling may only occur at a technically feasible point; and

(4) The CLEC must pay a reasonable price for the requested element, as determined in accordance with section 252.[49/]

The Supreme Court held, however, that the "necessary" and "impair" language of section 251(d)(2) fixes an additional limitation on the availability of UNEs. It instructed the Commission, on remand, to give some substance to those limiting standards, "taking into account the objectives of the Act."[50/]

A. Applicability of Section 251(d)(2)

Section 251(d)(2) specifies that:

> In determining what network elements should be made available for purposes of subsection [251](c)(3), the Commission shall consider, at a minimum, whether --
>
> > (A) access to such network elements as are proprietary in nature is necessary; and
> >
> > (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[51/]

49/ *Id.* § 251(c)(3).

50/ *AT&T Corp.*, 119 S.Ct. at 736.

51/ 47 U.S.C. § 251(d)(2) (Supp. II 1996).

NTIA agrees with Sprint that one reasonable construction of the statutory language is that the "necessary" and "impair" standards were meant to apply only to proprietary network elements.[52/] We nonetheless recognize that the Commission adopted (and the reviewing courts implicitly accepted) a different construction of the statute in the *Local Competition Report*, and that there are legitimate reasons why the Commission would be reluctant to reject that construction now.

NTIA submit, however, that there is only one other reasonable construction of section 251(d)(2). Plainly, the "necessary" standard applies only to proprietary elements. The "impair" criterion, on the other hand, would seem to apply to both proprietary and nonproprietary elements. The phrase "such network elements" in section 251(d)(2)(B) has only two possible antecedents -- "such network elements as are proprietary" in section 251(d)(2)(A) or "what network elements should be made available" in the first sentence of section 251(d)(2). If the former phrase is the intended antecedent, then the necessary and impair criteria limit access only to proprietary elements. If the latter antecedent governs, the "impair" standard must apply to all network elements eligible for unbundling under the general requirements of section 251(c)(3). That universe of "all possible UNEs" must necessarily include the subsets of proprietary and nonproprietary UNEs.

52/ Comments of Sprint Corporation at 11-12 (Sprint Comments).